Elder Law eNews

A Production of the Elder Law Section Communications Committee
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RECENT COURT DECISIONS

Correri Decision Followed in Article 78 Proceeding: NAMI Permitted to be Deposited into Third Party SNT

In this Article 78 proceeding in the Nassau County Supreme Court, petitioner appealed an ALJ decision which determined that a Medicaid A\R could not deposit the NAMI into a third party SNT for her disabled daughter. An article 81 guardian was appointed for the A\R and the Judgment in the guardianship proceeding specifically authorized the guardian to deposit the petitioner's income to "...the SNT for the benefit of Stephanie Kaiser, an adult disabled child ..." of petitioner. The Court in the Article 78 proceeding reversed the ALJ's decision. DOH argued that Correri was an eligibility case that determined that the NAMI need not be budgeted if the NAMI was contributed to a third party sole benefit SNT (the "SNT"). DOH argued that this case was different citing 18 NYCRR §360-4.9 having to do with including all available income after eligibility is determined. Thus, while the NAMI could be contributed to the SNT for purposes of eligibility, it could not thereafter be contributed to the SNT under the provisions of 18 NYCRR § 360-4.9 according to DOH. The court rejected this argument.

***Kaiser v. DOH*, July 24, 2006, Index No. 4668-06**

http://decisions.courts.state.ny.us/10jd/nassau/decisions/index/index_new/palmieri/2006jul/004668-06.pdf

Court Permits Recovery Against Refusing Community Spouse

Nassau County DSS instituted an action against a refusing Community Spouse (CS) to recover benefits provided to the Institutionalized Spouse. The recovery was sought under an implied contract theory. The refusing CS had resources in excess of the CSRA and income in excess of the MMMNA for the year in which the application was made. The CS argued that she would be subject to a hardship if she needed to pay for her husband's care and that the resources came from her family and were not marital assets.

The court indicated that undue hardship is not a defense in this proceeding and should have been asserted at the administrative level driving the application process; that the distinction between separate assets and marital assets have no place in the Medicaid context; that no proof was offered to show that discovery demands were made; and that computer print outs are competent forms of evidence under CPLR 4518 (a). Recovery against the CS was allowed.

***Clement v. Meager*, 11747-05, 2006 NY Slip Op 51588, August 14, 2006**

http://decisions.courts.state.ny.us/10jd/nassau/decisions/index/index_new/austin/2006aug/011747-05.pdf

Supervising Judge Has Limited Authority to Change Order Issued by Court Appointing Guardian

Under MHL §81.32 (b), the reports of guardians are to be examined by a supervising judge or an appointee of the court. That supervising judge or appointee has certain powers under that Section. In this proceeding, the supervising judge was held to have exceeded his authority because he ordered a change in the compensation of the guardian awarded by the court, altered the guardian's authority to pay professional fees, and directed of the need to file a bond. See MHL §81.32 for the powers that a supervising judge has in the process of reviewing reports and accountings submitted by guardians.

***In the Matter of William J. J.*, 2004-11107, 2005-01867, 2005-03646**
2006 NY Slip Op 6285; 2006 N.Y. App Div. Lexis 10327

http://www.nycourts.gov/reporter/3dseries/2006/2006_06285.htm

Trustees Not Barred From Making Unitrust Election Even though They Also Were Remaindermen of Testamentary Trust

The question before the Westchester County Surrogate was whether the trustees, who were remaindermen of a testamentary trust, could retroactively apply unitrust treatment under EPTL § 11-2.4. The decedent's will created a trust to pay income to his wife for life, remainder to his children. Two of his children became successor trustees on the death of their uncle. In March 2003, the trustees elected to convert the trust to a unitrust and sought to have the unitrust election made retroactive to the effective date of the statute, which was January 1, 2002. As a result, the amount paid to the widow was reduced by more than 50%. The court held that the trustees were not barred from making the election because they were also remainder beneficiaries and that the election could be made retroactively. The court remanded to the Surrogate's Court for a careful review of the fairness of the election and the application of all factors applicable to the making of the election, including those set forth in the statute.

***Matter of Heller*, 6 N.Y. 3d 649 (2006)**

http://www.nycourts.gov/ctapps/decisions/may06/52opn06.pdf

DSS Gives Up The Battle

DSS has advised its local districts that because of an "adverse decision" of the United States Supreme Court in *Arkansas v. Ahlborn*, 547 U.S. , 126 S. Ct. 1752, LEXIS 3455, recovery of SSL § 104-b liens from third party tort feasors is to be limited to that portion of the award allocated to past

Court of Appeals decided that under the assignment language in 42 USC 1396k(b) all of the proceeds of a settlement of a personal injury action were to be paid to Medicaid in satisfaction of the recipient's reimbursement obligation. Arkansas had a statute which required reimbursement from the entire settlement-meaning the reimbursement was not limited to that portion of the award relating to medical expenses incurred. DSS had adopted the rationale in *Calvanese* and now has issued GIS 06 MA/022 (9-14-06) to reflect the US Supreme Court's opinion regarding the limited scope of the federal statute and thus will, in the future, limit recovery to that portion of an award allocated to past medical expenses only. Food for thought: Is there a ground to seek reimbursement in pre *Ahlborn* situations where DSS acted beyond the scope of *Ahlborn*?

Does a Guardian Under SCPA § 1750 Have the Right to Terminate Life Sustaining Medical Care for a Mentally Retarded Person?

A mother sought to be appointed by the New York County Surrogate as guardian for her 26-year old mentally retarded female daughter. The mother's petition sought authority to make decisions concerning life sustaining treatment for her disabled daughter. The Surrogate granted the relief requested in the petition and the decision was appealed to the First Department. The daughter, through Mental Hygiene Legal Service, argued in the main that the statute under which the appointment was made (SCPA § 1750-b) violates the Equal Protection and Due Process Clauses of the United States Constitution. The First Department affirmed the Surrogate's decision. The First Department opined as follows: Due process was granted because a hearing was held and parties were afforded the right to present evidence. The protections afforded by the Equal Protection Clause were not denied because the state has an interest in protecting its most vulnerable citizens and has the right to treat incompetent people differently than a competent person. Equal Protection applies only to people who are similarly situated, and since this ward lacked capacity, the state is entitled to treat people with a lack of capacity different from people who have capacity. See NY Slip Op 06628, New York State Law Reporting Bureau, September 21, 2006.

http://www.nycourts.gov/reporter/3dseries/2006/2006_06628.htm

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The Family Law Committee of the Elder Law Section, is working on a survey to ascertain as to whether Guardianship Judges will permit an Incapacitated Person (IP) to be a Plaintiff or a Defendant in a divorce action. The survey is being limited to the counties listed below.

The Committee is attempting to find out what criteria are used by the Judges in each county. Thus far, the Committee has the following counties covered, with the persons in charge of interviewing the Judges and Law Secetaries:

(1) Suffolk County - Rita Eredics
(2) Greene & Columbia County - Andrea Lowenthal
(3) Nassau County - Jacqueline S. Carway
(4) Monroe County - Marcia Boyd
(5) Westchester County - Rita K. Gilbert

If any readers would be willing to assist in Kings County, Queens County, and Staten Island, the Committee would be most appreciative. Please contact Committee Chair Rita K. Gilbert at the address below:

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PROGRAM UPDATES

October 18-20, 2006 Elder Law Fall Meeting, Westchester Renaissance Hotel, White Plains
January 23, 2007 Elder Law Annual Meeting, Marriott Marquis Hotel,
New York City
April 13-14, 2007 Elder Law "UnProgram", Embassy Suites, New York City
August 2-5, 2007 Elder Law Summer Meeting, Stoweflake Resort,
Stowe, Vermont
October 17-20, 2007 Elder Law Fall Meeting, Turning Stone Casino,
Verona, NY
August 13-16, 2008 Elder Law Summer Meeting, Renissance Harbor Place, Baltimore, MD
October 23-26, 2008 Elder Law Fall Meeting, Otesaga Resort, Cooperstown

Please mark your calendars, and join us for informative, enjoyable events in fun locations.

If you have any suggestions as to how we can improve our electronic subscription, please send an e-mail to Howie Krooks, HKrooks@ElderLawAssociates.com or Dean Bress, dbwest@yahoo.com